APPEAL NO. 93507

On June 2, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine the sole disputed issue unresolved at the benefit review conference (BRC), namely, what is appellant's (claimant) correct impairment rating based on his compensable injury of (date of injury). While the parties agreed at the hearing that claimant had reached maximum medical improvement (MMI) on June 2, 1992, claimant apparently contended his impairment rating should be the 19% assigned by the therapist who evaluated him at the request of his treating doctor or the 13% assigned by his second opinion doctor. Giving presumptive weight to the report of the designate d doctor selected by the Texas Workers' Compensation Commission (Commission), the hearing officer concluded that claimant reached MMI on June 2, 1992, with a seven percent impairment rating. Claimant has appealed from that decision.

DECISION

Finding the evidence sufficient to support the findings and conclusions of the hearing officer, we affirm.

At the hearing, the parties stipulated that claimant's treating doctor was (Dr. M), that his second opinion doctor was (Dr. A), and that the Commission-selected designated doctor was (Dr. O). The parties also agreed that claimant reached MMI on June 2, 1992. According to the evidence, claimant stated that he hurt his back while in an attic cutting a vent hole for a central air and heating system on or about (date of injury). According to a written statement prepared by the claimant on February 12, 1993, his back problems limited him from bending over and straightening up, and also limited the time he could walk or stand without his right leg becoming numb and without having pain in the lower mid-section of his back. An MRI report of November 8, 1991, revealed that claimant, then age 55, had chronic intervertebral disk disease at the L3-4 and L5-S1 interspaces, and a report from (Dr. DO), dated January 27, 1992, diagnosed claimant with inoperable lumbar discogenic disease.

Also in evidence was a Report of Medical Evaluation (TWCC-69) signed by Dr. M on March 30, 1993, which stated that claimant reached MMI on "6-2-92" with a seven percent whole body impairment rating. Attached to Dr. M's TWCC-69 was a document entitled "Figure 84. Spine Impairment Summary" which indicated that seven percent impairment was assigned for a lumbar disorder, that no rating was given for any neurologic deficit, and that the range of motion (ROM) was "invalid." Other exhibits indicated that Dr. M referred claimant to National Rehabilitation Associates (Rehab) for impairment rating measurements which were completed on June 2, 1992, and that the physical therapist at Rehab assigned claimant a "total body impairment" of 19% consisting of seven percent based on diagnosis, 10% based on ROM, and two percent based on neurological for "L4." This report contained a sheet displaying the results of three measurements each for various lumbar motions and did not indicate that any tests were invalid. This report also stated it was not valid without a doctor's review and signature. However, the signature line for a doctor, below the therapist's signature, was blank. The hearing officer stated in his review of the evidence

that the Spine Impairment Summary attached to Dr. M's TWCC-69 was that of the designated doctor, (Dr. O), and that "[i]t is clear from this report that Dr. M's 7% rating was simply based on Dr. O's invalidation of the ROM testing and that it should not be considered as Dr. M's opinion of the correct impairment rating." Though not crucial to our decision, we do not mean to indicate our agreement with that assessment of that evidence since it is equally plausible that, not having signed the report of the therapist, Dr. M disagreed with the test results obtained by the therapist and agreed with Dr. O as to the invalidity of Dr. O's ROM testing.

A TWCC-69 signed by (Dr. A), claimant's second opinion doctor, stated that claimant had been referred by Dr. M for an evaluation and disability determination. Dr. A felt that claimant had a questionable herniated disc at L4-5 and was "basically suffering from low back pain." According to Dr. A's TWCC-69, he assigned claimant an impairment rating of 13% for a herniated disc and loss of motion, indicated he had reached MMI, but failed to state the date. Attached to Dr. A's TWCC-69 was a billing form indicating Dr. A saw claimant on April 20, 1993.

Dr. O's TWCC-69 indicated he saw claimant on December 4, 1992. The record does not indicate how it apparently came to pass that the designated doctor, selected to resolve a dispute over the impairment rating, saw the claimant on December 4, 1992, while Dr. M's TWCC-69 was signed on March 30, 1993, and Dr. A saw claimant on April 20, 1993. However, there was no disputed issue concerning the existence of an impairment rating dispute and we need not comment further on the matter. Dr. O's TWCC-69 assigned claimant a seven percent impairment rating but with respect to MMI simply stated "No Comment" and failed to state an MMI date. However, since the parties agreed on an MMI date of June 2, 1992, Dr. O's failure to indicate that MMI was reached and to state the date thereof was not, as it has been held to be in other cases, fatal to the validity of the impairment rating. Attached to Dr. O's TWCC-69 was his narrative report of December 18, 1992, which detailed the reasons why no rating was assigned for loss of ROM and why only seven percent could be assigned for claimant's degenerative disc disease and annular bulge.

The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.26(g) (Vernon Supp. 1993) (1989 Act) provides that "[i]f the commission selects a designated doctor, the report of the designated doctor shall have presumptive weight and the commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary in which case the commission shall adopt the impairment rating of one of the other doctors." The ultimate determination of the extent of impairment must be made upon medical and not lay evidence. Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992. We have frequently noted the important and unique position occupied by the designated doctor in the resolution of disputes over MMI and impairment ratings. *See e.g.* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. And we

have often stated that a "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence. Appeal No. 92412, *supra*. We are satisfied here of the correctness of the hearing officer's having accorded presumptive weight to Dr. O's impairment rating. While Dr. A felt the rating should be 13%, claimant's own treating doctor determined the same seven percent rating as did Dr. O and he apparently disagreed with the rehabilitation therapist's proposed 19% rating.

The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge